No. 19-35308

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Rentberry, Inc., and Delaney Wysingle,

Plaintiffs – Appellants,

v.

The City of Seattle,

Defendant – Appellee.

On Appeal from the United States District Court
for the Western District of Washington
Honorable Richard A. Jones, District Judge

Appellants' Reply Brief

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned attorney for Appellant Rentberry, Inc., certifies that Rentberry has no parent company and no publicly held company holds any stock in Rentberry.

DATE: October 4, 2019. Respectfully submitted,

s/ ETHAN W. BLEVINS

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INTRODUCTION

The City of Seattle's ban on communication between renters and potential tenants via online bidding platforms violates the First Amendment. Appellant Delaney Wysingle owns a rental property in Seattle and the City's moratorium unconstitutionally limits his ability to use Appellant Rentberry's bidding website. Wysingle has standing to sue because he had a concrete plan to solicit and receive bids via Rentberry and declined to do so because of the moratorium. His injury is not moot because he is reasonably likely to have vacancies in the future during the course of the moratorium.

The moratorium regulates speech by prohibiting parties from engaging in protected communication about prices. That prohibition does not survive intermediate scrutiny because it is based on conjecture and lacks the means-end fit required by the First Amendment. The decision below should be reversed.

ARGUMENT

I. Wysingle has standing to vindicate his First Amendment rights

a. Wysingle has suffered concrete injury

The City's argument on justiciability parrots the district court's holding without ever addressing Appellants' arguments dismantling that holding. As Appellants (Wysingle) explained, *see* Opening Brief at 9-15, the court below misread the record and the relevant caselaw. The City repeats these errors. Especially under the relaxed standing doctrine applied in First Amendment cases, Wysingle

plainly has demonstrated injury attributable to the City's Ordinance for which he can seek redress in this Court.

A First Amendment claimant has standing if he can show that he altered his expression to comply with the law at issue and alleges apprehension that the law would be enforced against him. *See Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1034 (9th Cir. 2006); *Nat'l Ass'n for Gun Rights, Inc. v. Mangan*, 933 F.3d 1102, 1112 n.9 (9th Cir. 2019) ("In the First Amendment context, 'self-censorship' is 'a harm that can be realized even without an actual prosecution.'" (quoting *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988))). Wysingle affirmed his intent to advertise his property and solicit bids on Rentberry before this case was filed in mid-summer 2018. ER 42. He altered his expression, however, and advertised on Zillow because he feared enforcement of the moratorium.[1] *Id.* The standing inquiry can end there. *Porter v. Bowen*, 496 F.3d 1009, 1019 n.11 (9th Cir. 2007) (individuals thwarted from using website's vote-swapping mechanism after it was disabled by the operators in response to threatened prosecution under state laws have standing to pursue their First Amendment claims and the website operators' standing need not be separately considered).

[1] The City clearly intends to enforce the moratorium. A section of the website for the Seattle Department of Construction and Inspections entitled "Codes We Enforce (A-Z)" includes the ordinance at issue here. *See* http://www.seattle.gov/sdci/codes/codes-we-enforce-(a-z).

The City asserts that Wysingle's injury was not concrete because he could not specify the exact date by which he would advertise his property. This is a serious misreading of the evidence. *See* Opening Brief at 13-15. This home has been a rental property since Wysingle acquired it in 2015. *See* ER 41. After the previous tenant moved out in February 2018, Wysingle predicted on July 12, 2018, that repairs to the house would be complete and it would again be ready to rent by the end of that month, and it was ready on August 4, 2018. *See* ER 42, 56.

Wysingle's concrete plans to use Rentberry were not "some day" intentions just because he couldn't pinpoint the exact date and time when he would engage in the prohibited expression. In *Lujan v. Defenders of Wildlife*, by contrast, the plaintiffs lacked standing because they had no "description of concrete plans, or indeed any specification of *when* the some day will be." 504 U.S. 555, 564 (1992). Specifically, the plaintiffs had made no plans to visit foreign project sites where there lived species allegedly threatened by a rule promulgated by the Secretary of the Interior. *Id.* Wysingle's plan was ironclad by comparison: he has rented this property since acquiring it; he declared his intent to advertise his rental unit when renovations were complete; the renovations were done within a few days of the date he predicted; and he did advertise for a tenant in compliance with all relevant laws and ordinances.

This was not a vague wish like the ephemeral hopes that failed to establish injury in *Lujan*.[2]

The City claims that Wysingle "during his deposition readily admitted that he was not sure whether he would use websites like Rentberry to rent his home and that he was merely considering doing so." Brief of Appellee City of Seattle at 14. The City offers no citation to the deposition because Wysingle never said that. Instead, Wysingle repeatedly said in his signed declarations and his deposition that he intended to advertise his property on Rentberry when the moratorium ended. *See* ER 42 ("I would like to use the website Rentberry to advertise my property and find a new tenant through Rentberry's bidding feature."); *id.* 58 ("[M]y goal is to use the bidding platform."); *id.* 59 ("Now, the technology, I understand, is newer, but I'm willing to try that."); *id.* ("I plan to use the bidding feature on these platforms to help determine the best market rate."); *id.* 60 ("I want to give the bidding process a try.");

[2] The City makes much of a "false" declaration signed by Wysingle. *See* Brief of Appellee at 13. Wysingle had filed a declaration in support of a withdrawn motion for preliminary injunction that contained a minor inaccuracy that has no bearing on justiciability: the declaration said there was a tenant in the unit as of May 15, 2018, but the tenant had broken his lease early and left in February 2018. Even if this misstatement were part of the record on appeal (and it is not), the corrected facts hurt rather than help the City's argument that Wysingle only has standing when his unit is empty. *See* Brief of Appellee at 16-17. The City does not dispute that Wysingle continuously operated this property as a rental home, and it is well-established that he had concrete plans to advertise on Rentberry that were thwarted by the challenged Ordinance. In any event, Wysingle corrected this trivial misstatement in his deposition and in his declaration in support of his motion for summary judgment. *See* ER 42, 57.

SA 046 ("I continue to want to use Rentberry, including the bidding feature, to advertise my property before the current lease terminates in June 2020."). Wysingle's actions confirmed these statements. Prior to filing suit, Wysingle visited Rentberry's website over a dozen times and spoke with Rentberry personnel to learn about the platform. ER 57, 59, 62.

b. Wysingle's injury is capable of repetition yet evades review

The City argues that any justiciable claim is now moot because Wysingle's house is currently occupied by a tenant. *See* Brief of Appellee at 16-17. By the City's logic, landlords (or tenants) would have standing to challenge rental restrictions only during the interval between leases—which is when Wysingle filed his claims in this case—and the City argues standing is extinguished once a new lease is signed. *Id*. That argument would make claims involving tenancy difficult or impossible to litigate during the necessarily brief windows of time between leases.

But the City is wrong about the law of standing. A claim is not moot if the injury previously suffered is capable of repetition yet evades review, especially when the timeframe during which the injury could occur is too brief to permit full litigation of the plaintiff's claims and there is a reasonable likelihood that the plaintiff will be subject to the challenged government action again. *N.A.A.C.P. v. City of Richmond*, 743 F.2d 1346, 1353 (9th Cir. 1984).

For example, in *Roe v. Wade*, the government argued that the legal challenge to a Texas abortion law was moot after the pregnant plaintiff had completed gestation. 410 U.S. 113, 124 (1973). The Supreme Court disagreed, noting that "pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied." *Id.* at 125.

Tenancy issues fit neatly into the "capable of repetition, yet evading review" exception because rental leases are inherently non-permanent. *See Moore v. Urquhart*, 899 F.3d 1094, 1100 (9th Cir. 2018) (rejecting claim that lawsuit challenging eviction procedures was moot because, among other reasons, "it is reasonable to expect that at some point in the future Moore and Shaw will again fall behind in their rent and thus could again be subject to eviction proceedings"). *See also*, *Mendoza v. Frenchman Hill Apartments Ltd. P'ship*, No. CV-03-494, 2005 WL 6581642, at *3 (E.D. Wash. Jan. 20, 2005) (challenge to Washington Unlawful Detainer Act not moot); *Gallman v. Pierce*, 639 F. Supp. 472, 480 (N.D. Cal. 1986) (challenge to eviction notices).

Hence, Wysingle's claims are not moot because his injury will recur each time his rental unit is advertised and yet, despite the recurrence, will evade review due to the brevity of rental vacancies. The length and frequency of vacancies are unpredictable. Wysingle's previous tenant broke his lease early, creating an unexpected vacancy. ER 41. Wysingle re-leased the property five months later for a

10-month term. As he has in the past, Wysingle would reasonably seek to fill any future vacancy as quickly as possible, whether that vacancy occurs at the end of the lease term or earlier, if the tenant gives notice. The combination of renewable one-year moratoria and a 10-month lease makes it highly likely that Wysingle will again need to find a tenant while the rent-bidding moratorium is in effect and yet lack enough time to fully litigate his claim. *See Gallman*, 639 F. Supp. at 480 (the days or months during which a rental is vacant is a "very brief time" in which to litigate issues arising from a tenancy). Wysingle would have used Rentberry's rent-bidding platform but for the Ordinance's moratorium and would do so in the future when his rental property is vacated—if this Court declares the Ordinance unconstitutional. *See* ER 42; SA 046. Much like pregnancy, the vacancy periods during which Wysingle would be able to advertise his property are too short to complete litigation. The City demands that Wysingle either forego any legal challenge to the moratorium or keep his property vacant for the course of the litigation so he can vindicate his constitutional rights. "Our law should not be so rigid." *Roe*, 410 U.S. at 125.

The City faults Wysingle for not advertising his unit during the brief window when the moratorium was not in force from May 1, 2019, through July 16, 2019. *See* Brief of Appellee at 14. First, Wysingle did not advertise on Rentberry during that timeframe because his current tenant chose to renew the lease. *See* SA 046. Wysingle

does not need to evict a good tenant to avoid mootness. His recurring injury for which he may seek relief arises when a lease terminates and is not renewed.

Moreover, the new moratorium would have outlawed Wysingle's attempt to use Rentberry even if he had declined to renew the lease. The current tenant's initial lease lasted through June 2019. SA 049. The earliest Wysingle would have begun advertising and showing the house was July 1, 2019, assuming no cleaning or repairs needed to be done. Hence, he would have had at most two weeks to use Rentberry before the moratorium extension became effective, after which time the Ordinance banned his use of the platform. Thus, the moratorium did indeed have an effect on Wysingle's decision to decline using Rentberry in 2019, as he stated in his supplemental declaration. SA 046. *See Allen v. City of Arcata*, 691 Fed. Appx. 461, 462-63 (9th Cir. 2017) (plaintiff deterred from action in response to defendant's conduct establishes injury-in-fact).

II. By prohibiting soliciting and placing bids on an online platform, the moratorium directly regulates speech

The City argues that the moratorium does not implicate the First Amendment because it only regulates a business transaction—i.e., conduct, not speech. But the City then contradicts itself by conceding that the moratorium does directly regulate speech: "The Ordinance does not prohibit all *communications about prices*, only those done through a specific medium—on-line auctioneering technology." Brief of Appellee at 20 (emphasis added); *see also id.* at 21 n.3 ("Nor does the Ordinance

prevent a potential tenant from *expressing a price* to the landlord. A potential tenant is free to do so by any number of means. The only way she cannot do so under the Ordinance is through online auction technology.") (emphasis added). These concessions acknowledge the straightforward language of the Ordinance: it does not regulate a rental transaction—it solely regulates expression about price. *See* ER 19; SA 007.

Communicating a price is protected speech. Opening Brief at 16-20 (citing *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 (1996) ("[T]here is no question that Rhode Island's price advertising ban constitutes a blanket prohibition against truthful, nonmisleading speech about a lawful product.")); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976) (ban on advertising price of prescription drugs violated First Amendment).

In every case cited by the City regarding the conduct/speech distinction, the regulation at issue dealt with a behavior and only had an incidental impact on speech. In *Airbnb, Inc. v. City and County of San Francisco*, 217 F. Supp. 3d 1066, 1073 (N.D. Cal. 2016), for instance, all parties agreed that the challenged regulation was not "directed to content or speech." The same is true of *Homeaway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 682 (9th Cir. 2019), where an ordinance prevented hosting platforms from completing a booking transaction for unlicensed properties—the law regulated a commercial transaction rather than information

relating to an anticipated transaction. The City also cites to an unreported decision since overturned by the Seventh Circuit. *Keep Chicago Livable v. City of Chicago*, No. 16C10371, 2017 WL 955421 (N.D. Ill. Mar. 13, 2017), *vacated and remanded, Keep Chicago Livable v. City of Chicago*, 913 F.3d 618 (7th Cir. 2019). Even so, the ordinance at issue in *Livable* regulated only commercial conduct by requiring short-term rentals to obtain a license and imposing reporting requirements on listing platforms. *See id.* at *3.

Each of the above cases involved direct regulation of a transaction. Here, by contrast, the moratorium does not regulate any aspect of a commercial transaction. It only regulates speech in anticipation of a transaction. This is clear from the City's own reading of the Ordinance. According to the City, nothing prevents landlords or house hunters from using Rentberry and completing a transaction via Rentberry. *See* Brief of Appellee at 6, 28-29. The only thing landlords cannot do is solicit bids or communicate a bid—i.e., engage in speech about price. *Id.* at 28-29. Speech does not morph into conduct just because the speech is related to commercial activity. Supreme Court "decisions . . . have made plain that a State's regulation of the sale of goods differs in kind from a State's regulation of accurate information about those goods." *44 Liquormart*, 517 U.S. at 512.

As a practical matter, Rentberry cannot function in Seattle due to the moratorium because its central function—bidding—cannot be used by Seattle

tenants and landlords. ER 45. The City makes light of this reality ("Rentberry is free to run its website as it sees fit," Brief of Appellee at 41) but this is akin to arguing that a City-imposed prohibition on reading books has no impact on bookstores, or a moratorium on bidding for antiques by Seattle residents would have no impact on how ebay.com communicates with buyers and sellers. *See Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988) (booksellers have standing for a pre-enforcement challenge to a statute prohibiting the commercial display of sexual materials harmful to juveniles); *American Booksellers Foundation v. Dean*, 342 F.3d 96, 101 (2d Cir. 2003) (operators of internet website providing sexual health advice has standing for a First Amendment challenge to a law prohibiting the transmission of sexually explicit material to minors).

The City states that Wysingle "cannot seriously contend that the Ordinance bans communication akin to solicitation, advertising, or marketing." Brief of Appellee at 23. Yet the City never rebuts the cases cited by Wysingle wherein courts explicitly recognized bidding as protected speech. *See* Opening Brief at 18; *Dep't of Professional Regulation, Bd. of Accountancy v. Rampell*, 621 So. 2d 426, 428 (Fla. 1993); *Jim Gall Auctioneers, Inc. v. City of Coral Gables*, Case No. 97-cv-3186-

CIV-SEITZ, Order on Cross-Motions for Summary Judgment at 12 (S.D. Fla. 1999).[3]

While there can be no dispute that price advertising is protected speech, the City's argument that a bid is not protected speech implies that sellers somehow have greater First Amendment rights than buyers. Likewise, a landlord has a constitutional right to list a price, but would not have a constitutional right to solicit price offers from applicants. The First Amendment does not permit the government to distinguish between speakers and speech content in such an arbitrary fashion; "[e]ffective speech has two components: a speaker and an audience. A restriction on either of these components is a restriction on speech." *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1232 (10th Cir. 1999); *Griswold v. Connecticut*, 381 U.S. 479, 482-83 (1965) ("[T]he state may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach . . . . Without those peripheral rights the specific rights would be less secure.") (citations omitted).

[3] *Available at* https://www.courtlistener.com/docket/10910567/56/jim-gall-auctioneers-v-city-of-coral-gables/.

In arguing that the moratorium does not regulate speech, the City also veers off course into the wrong First Amendment test. The City asks: "What message are landlords trying to convey by renting a home through an online platform?" Brief of Appellee at 22. This question betrays a fundamental misunderstanding about the First Amendment issue in this case. There are several speech interests at stake here: the landlord's interest in advertising, soliciting, and receiving bids (prices), and an applicant's interest in posting bids (prices). This price *is* the message.

No further message is required. The City errs in demanding one because a "particularized message" is only required when the First Amendment is applied to *conduct* that implicitly conveys a message. *Texas v. Johnson*, 491 U.S. 397, 404 (1989); *Spence v. Washington*, 418 U.S. 405, 410-11 (1974). In cases involving pure speech, as here, "a narrow, succinctly articulable message is not a condition of constitutional protection." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995).[4]

The City errs in arguing that Wysingle's theory of the case would subject all regulation of commercial activity to First Amendment scrutiny. *See* Brief of

[4] This Court also should reject the City's implication that Wysingle must prove a censorial motive. *See* Brief of Appellee at 23. When a law directly regulates speech, the government's motive is irrelevant. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (declining to "consider the government's justifications or purposes" for imposing a content-based restriction on speech"); *Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983) ("Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment.").

Appellee at 24-25. First, intermediate scrutiny requires a balance between protected speech and regulatory authority: "The entire commercial speech doctrine, after all, represents an accommodation between the right to speak and hear expression *about* goods and services and the right of government to regulate the *sales* of such goods and services." *44 Liquormart*, 517 U.S. at 499 (quoting Lawrence Tribe, *American Constitutional Law* § 12-15, p. 903 (2d ed. 1988)). Even though it offers less First Amendment protection, the commercial speech doctrine still recognizes that "regulation of the sale of goods differs in kind from a State's regulation of accurate information about those goods." *Id.* at 512. Constitutional protection for commercial speech does not endanger the City's ability to regulate the underlying conduct of entering into a lease agreement. "Thus, it is no answer that commercial speech concerns products and services that the government may freely regulate." *Id.*

III. The moratorium fails intermediate scrutiny because the City lacks evidence of harm and ignored less-restrictive alternatives

a. The moratorium is not a time, place, and manner restriction

In a brief footnote, the City defends the moratorium as a time, place, and manner restriction. The City's perfunctory defense does not constitute an adequate argument. *See* Brief of Appellee at 21 n.3. Regardless, the defense lacks merit.

A time, place, and manner restriction must be "justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288,

293 (1984)). Seattle's moratorium is content-based. The City itself argues that landlords are welcome to advertise on Rentberry and similar sites—they just cannot solicit bids. Brief of Appellee at 28-29. Hence, the only line dividing that which is regulated and unregulated is the content of the advertisement and the content of applicant-users' speech. The moratorium therefore cannot be justified as a time, place, and manner restriction.

Even if the Ordinance were construed as a time, place, and manner restriction, such restrictions still must be "narrowly tailored to serve the government's legitimate, content-neutral interests." *Rock Against Racism*, 491 U.S. at 798. Moreover, the government must "leave open ample alternative channels for communication of the information." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Here, the City concedes there are no adequate alternative channels because rental bidding platforms are more effective as a means of communicating bids than other mediums: "[A]bsent the use of the rent bidding platforms the Ordinance targets, it is very difficult to imagine rent bidding occurring on a scale that would have any measurable impact on the rental housing market." Brief of Appellee at 39-40. Hence, bidding outside the context of such platforms is not an adequate alternative channel.

b. The City's speculative claims of harm do not satisfy *Central Hudson*

The City hopes to prevail based on speculation from a conclusory report—prepared after this litigation was filed—that Rentberry will cause the harms the City fears. But the standard for intermediate scrutiny is clear: speculation and conjecture are not enough. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994). The City must demonstrate real evidence of *existing* harm. *Id.*

The City begins by misinterpreting its evidentiary burden. According to the City, "common sense" is enough to justify a speech regulation. Brief of Appellee at 34. But the City's citations do not support that point. For instance, in *Burson v. Freeman*, the Supreme Court discussed a substantial amount of evidence supporting speech restrictions in the specific context of the polling place and held those restrictions were necessary to protect the fundamental right to vote based on a "long history, a substantial consensus, *and* simple common sense." *Burson v. Freeman*, 504 U.S. 191, 210 (1992) (emphasis added). In *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), the Court upheld "common-sense judgments of local lawmakers," based on a broad legislative and judicial consensus and to avoid judicial "trespassing on one of the most intensely local and specialized of all municipal problems"—billboard regulation. *Id.* at 509. More to the point, the Supreme Court has repeatedly emphasized that the government's burden under intermediate scrutiny "is not satisfied by mere speculation or conjecture; rather, a governmental body

seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993); *see also Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 392 (2000).

The City's paltry evidence does not lead to a reasonable inference that the harms it recites are real. The alleged harms are two-fold: negative impact on housing costs and violation of local law. The City relies on a short PowerPoint presentation by a group of college students. Brief of Appellee at 3. The PowerPoint cites only two sources related to rent-bidding sites, *see* SER 16-17, both of which are short opinion pieces pulled from online news sites that criticize rent-bidding platforms and are rife with speculation and hyperbolic rhetoric. *See* SER 19-27. Moreover, both op-eds quote Rentberry's CEO, Alex Lubinsky, explaining that bidding may cause prices to rise or drop depending on market circumstances, and landlords may accept lower bids in some markets. *See* SER 21, 26. Neither op-ed rebuts Lubinsky.

Beyond that, the college PowerPoint describes a series of old studies about bidding outside the context of online platforms in the home sales context in foreign countries. *See* SER 16-17. The PowerPoint makes no effort to explain how Seattle's conditions are similar to those in the studies and therefore the studies cannot predict how an online bidding platform will operate in the rental market in Seattle, Washington.

None of this can satisfy the City's evidentiary burden. Indeed, not even the City considered the evidence cited in the PowerPoint as sufficient; hence the professed need for a city-commissioned study and the city council's admission that it remained "uncertain" about the impact of rental bidding platforms. ER 17-18.

The City now offers its post-hoc commissioned report as evidence justifying the Ordinance. Just as the op-eds cited by the college students state that the impact of rental bidding will depend on local market conditions, the report concedes that the "brief duration of rental bidding platforms operating in Seattle prevented local data collection. As a result, the effect of rental bidding platforms on the Seattle rental housing market and on equitable access to housing *cannot be analyzed*." SA 013 (emphasis added). Even outside the Seattle market, the report determined that important claims about the relative impact of these platforms "are unable to be validated." SA 014; *see also id.* 018 ("[D]ata on rental bidding platforms from other cities is also minimal.").

The City insists it can rely on anecdote, but the one "case study" in its report regarding the state of Victoria, Australia, does not even offer anecdotal evidence. The report notes that rental bidding platforms entered the Melbourne housing market in 2017.[5] SA 020. But the report only says that they were controversial, and then follows with the non-sequitur that a 2016 study of renters' experiences in Victoria

[5] Melbourne is the largest city within the state of Victoria.

indicated that as many as eighty percent of prospective tenants declined to pay more than the original listed price. SA 020. One may get the impression from the City's brief that the 2016 Victoria study analyzed the use of rental bidding platforms. Not so—such platforms had not even entered the Victoria housing market at that point. The Victoria study says nothing about the platforms at issue in this case or even whether bidding caused any noticeable impact on housing costs in Victoria. *See* SA 020.[6] In other words, the Victoria "case study" says nothing about the impact of rental bidding platforms in Victoria, Australia, much less in Seattle, Washington.

The City claims that it needs to react preemptively before rental bidding proliferates. Brief of Appellee at 30. But the premise that rental bidding will proliferate is wholly speculative. Indeed, the City's report conflicts with that conjecture, finding that very few landlords even had an interest in using the platform. *See* SA 022. The City has no evidence regarding a key premise of the Ordinance—that rental bidding would run rampant before the City could take regulatory action.

Aside from studying the impact on housing costs, the commissioned study was also supposed to determine whether rental bidding platforms "comply with the City of Seattle's fair housing and rental regulation laws." ER 17. The report, however, can only speculate on that front as well.

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[6] The full study is available at https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/5814/8781/7797/Victorian_Renting_Research_Report_-_RTA_Review_1.pdf. The section on bidding is at pages 75-76.

Initially, the study misinterprets the Ordinance by asserting that it was concerned about "[c]ompliance with federal fair housing protections, state rental housing regulations, and Seattle Municipal Code (SMC)." SA 015. This is false. The Ordinance lists only "compliance with the City Code" and nowhere mentions state and federal law. *See* ER 17. In line with this limited purpose, the City commissioned the study to investigate only "whether rental housing bidding platforms comply with The City of Seattle's fair housing and rental regulation laws." ER 19. The City repeated this limited focus in the renewed Ordinance. *See* SA 004.

Nonetheless, the report speculates about whether rental bidding platforms might violate federal and state law. *See* SA 016-18. Even if this section of the report related to the government interests identified in the Ordinance, it still fails to present adequate evidence. The report, for instance, alleges that short-term rental sites such as Airbnb and HomeAway may allow users to discriminate. *See* SA 016. This evidence proves nothing related to the use of rental bidding platforms, which provide a wholly different service, and, in any case, offers no theory as to how platforms that "allow" discrimination by other actors are violating any law, whether it be federal, state, or local. *See id.*; *cf. Rodriguez v. Maricopa Cty. Comm. College Dist.*, 605 F.3d 703, 710-11 (9th Cir. 2010) (government need not shut down mailing list and web servers to prevent users from engaging in potentially harassing speech).

Even if the City had evidence and a genuine theory of liability under which Rentberry might be violating a local law prohibiting discrimination, the Ordinance still could not stand. After all, if the City's interest here is about preventing discrimination on rental sites, then the Ordinance would be absurdly underinclusive. The moratorium targets fledgling sites with a small market share—and it has no evidence of discrimination on such sites—while ignoring Zillow, Craigslist, Airbnb, HomeAway, and others, where it claims to have purported evidence of discrimination. *See Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 801-02 (2011) (Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.); *National Inst. of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2375 (2018) (striking down "wildly underinclusive" law under intermediate scrutiny).

The only actual local housing law that the report discusses directly is the "first-in-time" rule—a law requiring landlords to offer a rental to the first qualified applicant. ER 24. That law is not currently in force, but the report tries nonetheless to make the case that rental bidding platforms *would* violate the first-in-time rule, were it enforceable, with a single conclusory sentence: "[R]ental bidding platforms would violate First-in-Time if it were to be restored." SA 021. Yet the City has maintained throughout the litigation challenging the first-in-time ordinance that

landlords can still impose whatever criteria they want, *Yim v. City of Seattle*, Case No. 95713-1, City of Seattle's Opening Brief at 1 (Wash. August 24, 2018), [7] which would ostensibly include a criterion such as "highest bidder."

In short, both the City report and the pre-enactment findings say remarkably little about the actual impact of rental bidding platforms in Seattle or whether such sites clash with local law. Perhaps recognizing this problem, the City asks this Court to remand because its year-long study "may not be the sole evidence the City would bring to bear." Brief of Appellee at 26. The City has twice had the opportunity to ascertain evidence necessary to restrict Wysingle's and Rentberry's speech rights. Now it asks for a third bite at the apple. The request for a remand should be denied.

c. The moratorium is a poor fit for achieving the City's ends

This Court must ascertain whether the moratorium is a close fit to the City's purpose. However, the City is unclear as to what purpose the Ordinance is intended to further. First, the City claims that the Ordinance is a "response to the undeniable and unprecedented affordable housing crisis sweeping the region." Brief of Appellee at 3. Yet it also claims that measures intended to "address housing affordability generally" have "no bearing on the interest the Ordinance is designed to further." *Id.* This bait and switch reflects the City's failure to employ less-restrictive alternatives

[7] http://www.courts.wa.gov/content/Briefs/A08/958131%20App's%20Opening%20Brief.pdf

to addressing affordable housing issues. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995); *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 373 (2002); Opening Brief at 36-37 (offering other means of helping Seattleites afford housing).

The City's new "interest" is to determine the impact of a new technology. But this proposal collapses means and end to evade the City's failure to consider alternatives for addressing the Ordinance's expressly stated purpose: to address the region's affordable housing crisis. The moratorium is intended solely to further that end. *See* ER 17 (justifying the Ordinance because "Seattle's housing market has become very competitive over the past decade, causing scarcity issues for tenants"). The lack of consideration for less-restrictive alternatives and the lack of concern for evidence conflict with the principle "that regulating speech must be a last—not first—resort. Yet it seems to have been the first strategy the Government thought to try." *Thompson*, 535 U.S. at 373.

The City also argues that the Ordinance is not underinclusive because, without rental bidding platforms, "it is very difficult to imagine rent bidding occurring on a scale that would have any measurable impact on the rental housing market." Brief of Appellee at 39-40. Yet the City has no evidence that rental bidding platforms themselves have had or will have "any measurable impact" greater than the impact of bidding that may occur in the absence of such platforms. Moreover, the City itself cited to the multiple studies in foreign countries as supposed evidence that bidding

causes problems for the housing market—yet these studies only addressed bidding in the absence of bidding platforms. *See* SA 020; SER 16-17. If one assumes Seattle is anything like these far-flung locations (as the City does), then similar non-platform bidding has been going on for years without the City's intervention (or, apparently, knowledge). The City's decision to strangle a new technology that has yet to have any measurable impact while allowing a similar process to go on for decades is irrational and underinclusive. *See Bernstein v. U.S. Dep't of State*, 974 F. Supp. 1288, 1307 (N.D. Cal. 1997) ("[D]ramatically different treatment of the same materials depending on the medium by which they are conveyed is not only irrational, it may be impermissible under traditional First Amendment analysis.").

CONCLUSION

Wysingle and Rentberry respectfully ask that this Court reverse the federal district court and enjoin the rent-bidding moratorium.

DATE: October 4, 2019. Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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s/ ETHAN W. BLEVINS
Ethan W. Blevins

CERTIFICATE OF COMPLIANCE FOR BRIEFS

9th Cir. Case Number: 19-35308

I am the attorney or self-represented party.

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